DATO' HARI MENON

v.

TEXAS ENCORE LLC & ORS

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[SUIT NO: 22-205-1999]
18 APRIL 2005

CIVIL PROCEDURE: *Striking out - Filing of unconditional appearance - Whether a bar to striking out application - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Striking out - Suit commenced by plaintiff as attorney for Ruler under power of attorney - Whether High Court has jurisdiction - Whether Ruler not suing in personal capacity - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Striking out - Suit commenced by plaintiff as attorney for Ruler under power of attorney - Issue of plaintiff's locus standi - Whether to be resolved at full trial - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Striking out - Action disclosed reasonable cause of action - Whether O. 18 r. 19 Rules of the High Court 1980 inapplicable*

CONSTITUTIONAL LAW: *Suit involving ruler - Proper forum to hear proceedings - Whether Special Court or High Court - Ruler not suing in personal capacity but represented by attorney under power of attorney - Whether High Court has jurisdiction - Federal Constitution, arts. 181, 182*

The plaintiff commenced this action against the defendants under a power of attorney given to him by the Ruler of Negeri Sembilan. The fourth defendant applied to strike it out under O. 18 r. 19 (1)(a), (b) or (d) of the Rules of the High Court 1980 but the application was dismissed by learned registrar. Hence, this appeal. The issues were: (1) whether the fourth defendant ('D4'), having entered unconditional appearance, had the right to invoke O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('RHC'); (2) whether the plaintiff had the necessary *locus standi* and whether that issue had been dealt with in earlier proceedings brought by the plaintiff against the defendants; and (3) whether this court had the jurisdiction to hear the action as it involved a Ruler.

Held (dismissing the appeal):

[1] D4, having entered unconditional appearance, had deprived itself of the right to invoke O. 18 r. 19(1)(a), (b) or (d) RHC which in effect constituted a challenge to the plaintiff's locus standi or the jurisdiction of the court. (p 698 d)

[2] The issue whether the plaintiff had *locus standi* or whether the court had jurisdiction in this action had been dealt with and disposed of by the learned judge in the earlier proceedings in the High Court. Therefore, that issue was *res judicata* and D4 was estopped from re-ventilating it before this court in the exercise of co-ordinate jurisdiction. (p 702 a)

[3] There was no dispute that the power of attorney granted by the principal to the plaintiff complied with the requirement of authentication under s. 3 of the Powers of Attorney Act 1949. Also, that the principal had declared that the attorney, *ie*, the plaintiff was "to be my attorney" and "in my name or otherwise to do all or any of the following things", one of which was to take legal proceedings as in the present case. The clauses in the power of attorney were to be construed in the context of all the clauses therein in order to determine the plaintiff's *locus standi*. That would merit a full trial. (p 704 d-e)

[4] A proper perusal of the plaintiff's statement of claim revealed that there were material averments setting out the plaintiff's role and participation in the events leading to the dispute, that culminated in the commencement of the plaintiff's claim. The plaintiff's claim did disclose a *prima facie* reasonable cause of action based on D4's alleged breach of duty and alleged damages arising therefrom. The strength or merits of the plaintiff's claim were not immediately relevant as they were to be tried in due course. (p 704 f)

[5] In respect of the jurisdiction of this court to hear this case, reference should be made to arts. 181 and 182 of the Federal Constitution, namely, the proper forum to hear proceedings involving a Ruler (whether as plaintiff or defendant in a personal capacity) is exclusively the Special Court. However art. 181(1) would include the Ruler's prerogative in granting a power of attorney to any person of legal capacity to act as his lawful attorney to do all things in accordance with the law, as in the present case to commence legal proceedings for and on behalf of the principal. Had the present case commenced by the principal in his personal

capacity, this court would have no jurisdiction to hear it and O. 18 r. 19(1)(a), (b) or (d) RHC would be applicable. However, the Ruler was not suing in his personal capacity as the plaintiff. It was the attorney who was suing as the plaintiff pursuant to the power of attorney. As a non-Ruler the plaintiff was subject to the jurisdiction of the High Court as one of the ordinary courts. As such, O. 18 r. 19(1)(a), (b) or (d) RHC was inapplicable. It was a matter that was premature for decision at the moment and had to be resolved after a full trial. (pp 704 g, 706 g & 707 b-d)

Case(s) referred to:

Adaikappa Chettiar v. Thomas Cook & Son (Bankers) Ltd [1933] AIR PC 78 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cassell & Co Ltd v. Broome [1972] AC 1027 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2003] 1 CLJ 801 FC ***(refd)***

Faridah Begum Abdullah v. Sultan Hj Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah [1996] 2 CLJ 159 SC ***(refd)***

Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1996] 1 CLJ 9 SC ***(refd)***

Jones and Saldanha v. Gurney [1913] WN 72 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kewangan Utama Bhd v. Cassells Sdn Bhd & Anor [1998] 3 CLJ Supp 295 HC ***(refd)***

Kuantan Kuala Lumpur Express Omnibus Co Ltd v. Utama Express Sdn Bhd [1986] 1 CLJ 598; [1986] CLJ (Rep) 418 HC ***(refd)***

Lee Sem Yoong v. Leong Yoong [1967] 2 MLJ 86 ***(refd)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 HC ***(refd)***

Malaysia Land Investment Co (Pte) Ltd v. Sathask Realty Sdn Bhd & Ors [2001] 1 MLJ 451 ***(refd)***

Middle East Tankers and Freighters v. Owner of the Vessel and Other Interested Party in the Vessel of MV "IRA' [1996] 2 CLJ 314 HC ***(refd)***

Mohamed Zainuddin Puteh v. Yap Chee Seng [1978] 1 MLJ 40 ***(refd)***
Mothercare Limited v. Robson Books Limited [1979] FSR 466 ***(refd)***
N Carrupaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***
Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466 CA ***(refd)***
Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 SC ***(refd)***
Re Azhar Azizan Harun sebagai wakil mutlak Eleanor Dulcie Robinson [1999] 1 CLJ 194 HC ***(refd)***
Sarkawi Sadijo v. BMG Music (M) Sdn Bhd & Ors [1996] 4 MLJ 515 ***(refd)***
Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi & Anor [1960] AIR SC 941 ***(refd)***
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 FC ***(refd)***
Sundralingam v. Ramanathan Chettiar [1967] 2 MLJ 211 ***(refd)***
Tan Yoke Kee v. CIMB Securities Sdn Bhd & Ors [1997] 5 CLJ 634 HC ***(refd)***
Tara Rajaratnam v. Datuk Jaginder Singh & Ors [1981] 232 ***(refd)***
Tengku Razaleigh Tengku Mohd Hamzah v. Election Judge For Election Petition No 33-6-1995 & Ors [1996] 1 CLJ 366 HC ***(refd)***
The "Avro International" The "Avro Venture" "Avro International) (Owners of) v. Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 ***(refd)***
Tungku Abubakar & Ors v. His Highness The Sultan of Johore [1949] 15 MLJ 187 ***(refd)***
Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors [1989] 1 MLJ 252 ***(refd)***
Wilkinson v. Barking Corporation [1948] 1 KB 721 ***(refd)***
Wilkinson v. Sibley & Anor [1932] 1 KB 194 ***(refd)***
YAM Tengku Iskandar Ibni Almarhum Tengku Ahmad lwn. Majlis Kerajaan Negeri Kelantan & Satu Lagi [1998] 1 CLJ Supp 416 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 181, 182(2)
Powers of Attorney Act 1949, s. 3(2)
Probate and Administration Act 1959, s. 52
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), O. 71, O. 72

Other source(s) referred to:
Halsbury's Laws of England, vol 1(2), 4th edn 1990, para 60

For the plaintiff - Cyrus Das (K Mohan with him); M/s Shook Lin & Co
For the 4th defendant - RS Nathan (N Segaram with him); M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (83) filed by appellant-defendant 4 ("D4") against the decision of the learned registrar who had on 25 July 2003 dismissed with costs D4's application in enclosure (26) seeking to strike out the plaintiff's writ and statement of claim, under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 in that it discloses no reasonable cause of action, is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court respectively.

D4 has entered unconditional appearance.

A reference hereinafter to an order or a rule is a reference to that order or rule in the Rules of the High Court 1980 unless otherwise stated.

Factual Background

The plaintiff has commenced this action pursuant to a power of attorney given to him as attorney for his principal, DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus ("the principal") who has authorised the plaintiff to commence this action against all the four defendants who are referred to respectively as D1, 2, 3 and 4.

Where relevant, the plaintiff's statement of claim avers that:

1. D1 is a limited liability company incorporated in the United States of America and having its office in Detroit, to produce activated tyre rubber. It has been set up by one Patrick A Moran (D2) who is also its chief executive officer, brain, mind, will and alter ego.

2. The principal together with four other Malaysian participants have agreed to pick up 25% interest in D1.

3. D2 has now claimed that the principal and the other Malaysian participants have not fully contributed towards the purchase of the 25% interest and their stake is now reduced to 7.35%.

4. D2 represented that D1 would require banking facilities which were obtainable from D3 in Stamford, Connecticut to finance D1's plant in Detroit, and that for this purpose a letter of credit in the sum of US1 million was needed.

5. D2 made representations to and sought this letter of credit from the principal and the other Malaysian participants, but as the other Malaysian participants were not in a position to establish it, it fell upon the principal to do so by letter dated 5 February 1999 addressed to the Seremban branch of Standard Chartered Bank Malaysia Bhd (D4).

6. On 12 February 1999, D4 established in favour of D3 a conditional standby letter of credit bearing No. 312010325732-A ("the SLC") in the amount of US1 million for a duration of 24 months on the terms and conditions therein stated. A copy of the SLC was given to the principal but the "Uniform Customs and Practice for Documentary Credit 1993 Revision" was not extended to nor the contents made known to the principal or the plaintiff.

7. By letter dated 15 February 1999, D4 required the principal to execute, and the principal did execute, security in the form of a letter of set-off over a fixed deposit in the sum of RM4,180,000 ("the fixed deposit") deposited by the principal with D4.

8. Thereafter, neither D1 nor D2 notified the principal of any progress or development in respect of D1's plant, although the principal was led to believe and verily believed that there had been no disbursements yet by D3 of the approved banking facilities to D1.

9. The principal, being apprehensive at the lack of progress on D1's project and his exposure therein, by letter dated 6 April 1999 asked for the SLC to be suspended.

10. The plaintiff personally discussed the principal's concern with the relevant officer of D4 who advised that the SLC could not be revoked except with the consent of D3 as beneficiary, but suggested that a message be sent to D3 giving notice of intention to suspend the SLC.

11. However, the plaintiff insisted that D4 as the establishing bank should notify D3 of the principal's intention to rescind the SLC, which D4 by telex transmission dated 16 April 1999 gave notice of rescission ("the notice of rescission").

12. The principal was entitled at any time before disbursement of funds to withdraw the letter of credit and D3 would be expected not to disburse the facilities as an essential pre-condition set by itself, but D3 proceeded to disburse it in November 1999.

13. By a telecommunication message dated 15 December 1999, with a copy to the plaintiff, D4 was informed by its agent, Standard Chartered Bank New York, that D1 had given notice of drawing on the SLC "in the near future" and indicated that they had "confirmed" the SLC, but the plaintiff and the principal were never notified thereof.

14. To date no factory or plant has been erected in Detroit nor the installation of any equipment thereon.

15. D3 had due to want of care or prudence allowed D1 to utilise the banking facilities without checking or verifying whether they were due, to the detriment of the principal.

16. The SLC was revocable and was duly revoked by way of D4's notice of rescission and D3 was not entitled to exercise any purported rights thereunder, nor was D4's agent entitled or obliged to honour any purported call or claim on the SLC.

17. The letter of set-off and any rights of set-off over the fixed deposit were rights granted by the principal in consideration of D4 issuing the SLC; and pursuant to the revocation of the SLC, D4 ceased to have any or any enforceable rights of set-off over the fixed deposit.

18. The SLC was not enforceable by D3 and did not create rights in its favour until and unless accepted by D3, and the SLC was a mere offer to provide credit which offer was validly withdrawn on or about 16 April 1999 by way of D4's notice of rescission as the SLC had not at the material time been accepted by D3 nor had D3 furnished consideration to give rise to binding legal relations.

19. By reason of the notice of rescission, D4 has conceded and is estopped from recognising or accepting any purported call on the SLC and is consequently not entitled to exercise any rights of set-off over the fixed deposit or otherwise.

20. D3 in purporting to make a call on the SLC acted fraudulently, unconscionably, illegally or unlawfully, and particulars were given.

21. The plaintiff prays for, *inter alia*, the following reliefs:

(1) A declaration that D4 is not entitled to uplift or apply or appropriate the fixed deposit sum of RM4.18 million or any part thereof in settlement of any liability *vis-à-vis* D3 after having notice of rescission of the letter of credit by the principal and after having itself notified D3 of the same;

(2) Damages; and

(3) Costs.

Entry Of Unconditional Appearance

Plaintiff's learned counsel Dato' Dr. Cyrus Das assisted by Mr. K Mohan submitted that it is too late for D4 to invoke O. 18 r. 19 as it had entered an unconditional appearance, citing *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd Ors* [1995] 1 CLJ 461 SC.

For D4, learned counsel Mr. R.S. Nathan assisted by Mr. N. Segaram, responded that the prevailing view is to the contrary, referring to:

1. *Tan Yoke Kee v. CIMB Securities Sdn Bhd & Ors* [1997] 5 CLJ 634, 638;
2. *N Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116;
3. *Malaysia Land Investment Co (Pte) Ltd v. Sathask Realty Sdn Bhd & Ors* [2001] 1 MLJ 451, 458;
4. *The "Avro International" The "Avro Venture" "Avro International" (Owners of) v. Arabian Marine Bunkers Sales Co. Ltd. & Anor.* [1988] 1 MLJ 147;
5. *YAM Tengku Iskandar ibni Almarhum Tengku Ahmad lwn. Majlis Kerajaan Negeri Kelantan & Satu lagi* [1998] 1 CLJ Supp 416;
6. *Wilkinson v. Barking Corporation* [1948] 1 KB 721; and
7. *Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602.

The above submissions revolve around an immensely important issue of procedural law and so, in my judgment, requires an elaborate examination.

In *Tan Yoke Kee, supra*, the first defendant CIMB Securities had filed an unconditional appearance to the plaintiff's claim. On the plaintiff's submission that the first defendant was precluded from relying on O. 18 r. 19, RK Nathan JC (later J) observed that it was based on a complete misreading and misunderstanding of an admiralty case *Middle East Tankers and Freighters v. Owner of the Vessel and Other Interested Party in the Vessel of MV "IRA'* [1996] 2 CLJ 314 that the admiralty case was not applicable, since O. 18 r. 19(1) was self-explanatory, as a result of which the court may at any stage of the proceedings entertain the application to strike out the plaintiff's writ.

On my part, I would respectfully note that the Supreme Court judgment in *Alor Janggus, supra*, was not brought to the attention of the learned judge in *Tan Yoke Kee, supra.*

One of the issues for determination in *N. Carrupaiya, supra*, was whether the filing of an unconditional appearance was a bar to the filing of an application under O. 18 r. 19. Mohd Hishamuddin bin Mohd Yunus J considered *Alor Janggus, supra,* and gave the answer in the negative.

In *Malaysia Land Investment, supra*, Clement Skinner J held at p. 459 I that the entry of an unconditional appearance by a defendant would not amount to a waiver of the irregularity complained of so as to prevent a challenge to authority being mounted at a later stage of the proceedings. Neither O. 18 r. 19 nor *Alor Janggus, supra*, had been referred to the learned judge.

In *The "Avro International", supra*, at p. 149 G-I, right column, Lai Kew Chai J in delivering the judgment of the Singapore Court of Appeal held:

> The effect of entering an unconditional appearance is twofold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see Vol 1 *The White Book* 1979 Ed paras 12/1/3. A defendant who wishes to set aside the writ or its service for non compliance of the rules or procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

At p. 150 F-H, left column, the learned judge recognised the following exception:

> The one exception from the general effect of an unconditional appearance is the situation where a court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson v. Barking Corp* [1948] 1 KB 721. There, the defendant was allowed to assert the want of jurisdiction of the court although he had entered an unconditional appearance because a statutory tribunal and not the court was vested with the jurisdiction to entertain the claims of superannuation such as the one asserted by the plaintiff. An exception to the effect of an unconditional appearance was made in that case because the court would otherwise have entertained the claim contrary to law.

This one exception arising from *Wilkinson, supra*, was applied by Azmel J in *YAM Tengku Iskandar, supra*, where on the defendant's application to strike out the writ and statement of claim under O. 18 r. 19 on the ground of jurisdiction, the plaintiff raised a preliminary objection because the defendant had entered unconditional appearance. *Alor Janggus, supra*, was not brought to the attention of the learned judge.

In *Leong Pak Kheong, supra,* the defendant had entered unconditional appearance and applied to strike out the writ and statement of claim under O. 18 r. 19. Azmel J applied the Supreme Court judgment in *Alor Janggus, supra,* and held that the defendant's application must fail under O. 18 r. 19(1)(a) since the issue was on *locus standi* which in fact concerned the jurisdiction of the court, as such application must be preceded by a conditional appearance.

On my part, the above authorities must be read in the context of the judgment of the Supreme Court in *Alor Janggus, supra,* in relation to procedure where at p. 475, Jemuri Serjan CJ (Borneo) observed:

> **Procedure**
>
> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court 1980 ("the RHC") because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities.

The learned Chief Judge then analysed a plethora of authorities in relation to this procedure, and authoritatively stated at p. 478 as follows:

> It was open to the defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded.

With respect, I am of the view that the above expositions of the Supreme Court constitute *ratio decidendi*, rather than mere *obiter dictum.*

In line with the doctrine of *stare decisis*, I am bound by the decision of the Supreme Court as was stated by Ong Hock Thye FJ (later CJ (M)) in the Federal Court in *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211 at p. 213B right column as follows:

> Each court, of course, is bound by the decisions of courts above it, …

I agree with the observation of Arifin Zakaria J (now JCA) in *Tengku Razaleigh bin Tengku Mohd Hamzah v. Election Judge For Election Petition No 33-6-1995 & Ors* [1996] 1 CLJ 366 that where a discernible *ratio decidendi* is found in a judgment of eg, the Supreme Court, that ratio is no doubt a binding precedent upon the High Court and it is not open to the High Court to disregard it even if the High Court were of the view that the Supreme Court had arrived at a wrong decision and that the position of the Supreme Court (now Federal Court) is similar to the House of Lords in England, whose decisions are binding on every court inferior to it: *Wilkinson v. Sibley & Anor* [1932] 1 KB 194. (See also the speech of Lord Hailsham LC in *Cassell & Co Ltd v. Broome* [1972] AC 1027 at p. 1054; [1972] 1 All ER 801 at p.809; [1972] 2 WLR 645 at p. 653 and *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645, Peh Swee Chin FCJ (as he then was)).

In the circumstances, I hold that D4 having entered unconditional appearance has deprived itself of the right to invoke O. 18 r. 19(1)(a), (b) or (d) which, as shall be seen later in my judgment, in effect constitutes a challenge to the plaintiff's *locus standi* or the jurisdiction of the court.

Res Judicata

It was argued for the plaintiff that, at the hearing of enclosure (9) filed by the plaintiff to continue the *inter partes* injunction, and enclosure (12) filed by the defendant to set it aside, D4 has raised plaintiff's *locus standi* and the jurisdiction of the court, and that on 19 June 2002, Muhamad Ideres J had allowed enclosure (9) and dismissed enclosure (12) ("the two decisions"). D4's appeals against the two decisions are now pending in the Court of Appeal and that, in so far as the High Court is concerned, the issues *viz. locus standi* and jurisdiction are *res judicata* and D4 is estopped from raising them here. The following cases were cited:

1. *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293;
2. *Sarkawi bin Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515;
3. *Kuantan Kuala Lumpur Express Omnibus Co. Ltd. v. Utama Express Sdn. Bhd.* [1986] 1 CLJ 598; [1986] CLJ (Rep) 418;
4. *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 1 CLJ 9; and
5. *Kewangan Utama Bhd v. Cassells Sdn Bhd Anor* [1998] 3 CLJ Supp 295.

D4's response is that the issues of *locus standi* and jurisdiction are not *res judicata* as D4's instant application in enclosure (26) is independent of enclosures (9) and (12), relying on:

(1) *Keet Gerald Francis Noel John, supra;*

(2) *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd.* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346;

(3) *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40, 42;

(4) *Tara Rajaratnam v. Datuk Jaginder Singh & Ors.* [1981] 232, 234;

(5) *Lee Sem Yoong v. Leong Yoong* [1967] 2 MLJ 86;

(6) *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19;

(7) *Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127; and

(8) *Mothercare Limited v. Robson Books Limited* [1979] FSR 466.

At this juncture, it is appropriate for me to put in place the relevant principles relating to "*res judicata*" and "issue estoppel" which I shall refer to interchangeably.

Authorities abound in explaining what these expressions mean. It is enlightening to embark on a discussion of some of these authorities.

In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466, Mokhtar Sidin JCA in delivering the majority judgment of the Court of Appeal revisited this doctrine as expounded by the courts in India, England and Malaysia, where his Lordship referred to the position as explained by Peh Swee Chin FCJ (as he then was) in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium.*

In *Hartecon, supra,* the Court of Appeal, through the judgment of Gopal Sri Ram JCA, referred to the judgment of Sharma J in *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74 and the judgment of the Indian Supreme Court in *Satyadhyan Ghosel and Ors. v. Sint Deorajin Dobi and Anor.* AIR [1960] SC 941 which stated the law on the subject as follows:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata,* it shall be not adjudged again. …
>
> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

Parties are therefore bound by the doctrine of *res judicata* from re-agitating an issue that had been resolved in earlier proceedings.

In this regard, the authorities cited for D4 may now be examined.

The judgment of Abdul Hamid CJ(M) (later CJ Malaysia) in *Si Rusa, supra,* does not concern the application of *res judicata.*

Similarly, *res judicata* also does not form any part of the judgment of Hashim Yeop A Sani J (later CJ(M)) in *Mohamed Zainuddin, supra.*

The judgment of the Federal Court delivered by Wan Suleiman FJ (as he then was) in *Tara Rajaratnam, supra,* shows that *res judicata* does not apply to the case of striking out an indorsement to the writ and the statement of claim with liberty to file afresh.

In *Lee Sem Yoong, supra,* the relevant facts reveal that the former suit between the parties in the sessions court for the same matter and upon the same cause of action, has not been decided by that court. In another action before Gill J (later CJ (M)), the defendant set up the defence of *res judicata,* but the learned judge held that it was not available to the defendant.

The preliminary and substantial issues raised in *Cheng Hang Guan, supra,* had no semblance with the issue in the instant appeal, as the matter there went on for full trial.

In another case, *Perumahan Farlim* [1989], *supra,* no question of *res judicata* was ventilated.

The judgment of Megarry VC in *Mothercare, supra*, did not decide the question as to whether the consideration and determination of the serious questions to be tried at the hearing of the interlocutory injunction can give rise to the plea of *res judicata* in a striking out proceeding under O. 18 r. 19(1).

In the circumstances, the authorities cited for D4 were not supportive of D4's contention.

I shall now consider whether the *locus standi* and jurisdiction points had been ventilated by the parties herein and disposed of by Muhamad Ideres J in the two decisions. For this purpose, it is essential for me to refer to the Court of Appeal judgment delivered by Gopal Sri Ram JCA in *Keet Gerald, supra,* touching on the function of a judge hearing an application for an interlocutory injunction, as follows:

(1) ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the *status quo*.

It is abundantly clear to me that in the two decisions, the learned judge must have considered and determined whether or not there was a *bona fide* triable issue or a *bona fide* serious issue to be tried ie, whether the plaintiff has the *locus standi* or whether the court has jurisdiction in this action (see also *Sarkawi*, supra). This is binding on all parties to the lis until its reversal on appeal: per Gopal Sri Ram JCA when delivering the judgment of the Court of Appeal in *Hartecon, supra*.

The expressions "triable issue" and "issues to be tried" may be used interchangeably, to mean the same thing: per Wan Hamzah SCJ in delivering judgment as a first instance judge in *Kuantan Kuala Lumpur Express Omnibus, supra.*

In my judgment, since the issue whether the plaintiff has *locus standi* or whether the court has jurisdiction in this action has been dealt with and disposed of by the learned judge in the two decisions, this issue is *res judicata* and D4 is estopped from reventilating it before me in the exercise of co-ordinate jurisdiction (see also *Kewangan Utama, supra,* per Tee Ah Sing J).

Locus Standi Of Plaintiff And Jurisdiction Of Court

It was submitted for D4 that:

1. The plaintiff lacks *locus standi* as the action must be commenced in the principal's name in the Special Court established under art. 182(2) of the Federal Constitution, relying on *Halsbury's Laws of England,* vol. 1(2) 4th edn. 1990 para 60; *Jones and Saldanha v. Gurney* [1913] WN 72; *Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors* [1989] 1 MLJ 252; and *Re Azhar Azizan Harun sebagai wakil mutlak Eleanor Dulcie Robinson* [1999] 1 CLJ 194.

(For brevity and convenience, a reference hereinafter to an article is a reference to that article in the Federal Constitution).

2. The plaintiff does not have a cause of action against D4 and so O. 18 r. 19(1)(a) applies; and

3. The plaintiff's action is to circumvent art. 182(2) and so is an abuse of the process of the court under O. 18 r. 19(1)(d). Support was sought in *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah* [1996] 1 MLJ 617; and *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2003] 1 CLJ 801; and

4. Art 181 is irrelevant, and there can be no voluntary submission to the jurisdiction of the ordinary courts.

The plaintiff contends that:

1. The plaintiff's *locus standi* under s. 3(2) of the Powers of Attorney Act 1949 is an issue that merits a trial. *Adaikappa Chettiar v. Thomas Cook & Son (Bankers) Ltd.* [1933] AIR PC 78 was cited;

2. Under art. 181(2), only proceedings "against" a Ruler should be brought in the Special Court, as a Ruler may waive immunity by a voluntary submission to the jurisdiction of the ordinary courts on the strength of *Tungku Abubakar & Others v. His Highness The Sultan of Johore* [1949] 15 MLJ 187; on appeal [1952] AC 318 PC; and

3. Striking out under O. 18 r. 19 is a drastic measure which is adopted only when the case is "obviously unsustainable", relying on *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.

In my judgment, I shall refer to *Halsbury's Laws of England*, vol. 1(2) 4th edn. 1990 para 60 which, where relevant, contains the following passage:

> **60. Exercise of authority under deed.** An agent acting under a power of attorney should, as a general rule, act in the name of the principal. If he is authorised to sue on the principal's behalf, the action should be brought in the principal's name: *Jones and Saldanha v. Gurney* [1913] WN 72.

In *Jones and Saldanha, supra,* Jones a resident in Vancouver had appointed Saldanha as his attorney to take proceedings in England, and this action was brought by Jones and Saldanha as co-plaintiffs against Gurney who moved that the name of Saldanha be struck out on the ground that he was not a necessary or proper party to any relief sought in the action. Swinfen Eady J held that the power of attorney granted to Saldanha was no ground for making him a party and that proceedings taken by an attorney ought to be taken in the name of his principal.

Similarly, in *Wee Tiang Kheng, supra,* the first named plaintiff was at all material times not a registered co-proprietor of the shophouse as alleged in the statement of claim, but was actually a donee of the power of attorney created by one Wee Lip Jin. On these facts, Chong Siew Fai J (later CJ (Sabah & Sarawak) applied *Jones and Saldanha, supra,* and allowed the second and third defendants' application to set aside the judgment in default of defence.

In *Re Azhar Azizan Harun, supra,* the petitioner had filed a petition "sebagai wakil mutlak Eleanor Dulcie Robinson" (as the absolute agent of Eleanor Dulcie Robinson) for resealing a grant of probate pursuant to s. 52 of the Probate and Administration Act 1959 and O. 71 and O. 72 of the Rules of the High Court 1980, in the name of the petitioner, in his capacity as attorney for the executrix in accordance with a power of attorney of the executrix. RK Nathan J held, *inter alia*, that there are no specific provisions in the Rules of the High Court 1980 or in the Probate and Administration Act 1959 providing for the filing of such a petition as the petition should have been filed in the executrix's name. However, the learned judge held that the petitioner was entitled to affirm the affidavit verifying the petition on behalf of the executrix, as the powers conferred by the power of attorney was wide enough to enable the petitioner to do so.

On my part, I find that the authorities *viz* from *Halsbury Laws of England, supra,* to *Re Azhar Azizan Harun, supra,* cited for D4, did not decide on the striking out under O. 18 r. 19(1) and so may be distinguished. Further no reference was made to the express clauses of the power of attorney in each particular case and the Powers of Attorney Act 1949. It is clear to me that the purposes for which a power of attorney may be used are to be found in s. 3(2) of the Powers of Attorney Act 1949 which reads:

> (2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

In the appeal before me, there is no dispute whatsoever that the power of attorney granted by the principal to the plaintiff has complied with the requirement of authentication under s. 3 of the Powers of Attorney Act 1949, and that the principal has declared that the attorney ie, the plaintiff is "to be my attorney" and "in my name or otherwise to do all or any of the following things", one of which was to take legal proceedings, as in the instant case. The clauses in the power of attorney are to be construed in the context of all the clauses therein in order to determine the plaintiff's *locus standi*. This in my view would merit a full trial.

A proper perusal of the plaintiff's statement of claim reveals that there are material averments setting out the plaintiff's role and participation in the events leading to the dispute which culminated in the commencement of the plaintiff's claim which in my view does disclose a *prima facie* reasonable cause of action based on D4's alleged breach of duty in relation to the said facilities and alleged damages arising therefrom. I must add that at this stage, the strength or merits of the plaintiff's claim are not immediately relevant, as they are to be tried in due course.

The next issue concerns the challenge mounted by D4 on the jurisdiction of this court. In my view, the answer may be found by reference to arts. 181 and 182 of the Federal Constitution and the judgments which set out the governing principles.

Arts 181 and 182 merit reproduction as follows:

Saving for Rulers' sovereignty, etc.

181 (1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV.

The Special Court

182 (1) There shall be a court which shall be known as the Special Court and shall consist of the Chief Justice of the Federal Court, who shall be the Chairman, the Chief Judges of the High Courts, and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

(2) Any proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under Clause (1).

(3) The Special Court shall have exclusive jurisdiction to try all offences committed in the Federation by the Yang di-Pertuan Agong or the Ruler of a State and all civil cases by or against the Yang di-Pertuan Agong or the Ruler of a State notwithstanding where the cause of action arose.

In *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah CJ (now HRH the Sultan of Perak), speaking in a panel of five judges of the Federal Court at p. 32 concisely set out the principles of interpreting a constitution in the following words:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is *sui generis* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules

> of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *AG of St. Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at p 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution. …

These principles were applied by Mohd Azmi FCJ (as he then was) in *Faridah Begum, supra*, where it was held that art. 181(2) took away the immunity of a Ruler from being sued, but the proceedings must be brought in the Special Court and that art. 182(3) confers exclusive jurisdiction on the Special Court to try, *inter alia*, all civil cases brought by, or against, a Ruler; and explained at p. 174 as follows:

> It would therefore appear from the exclusivity provision of cl. (3) that the new art. 182 not only has taken away the legal immunity enjoyed by HRH from being sued, but also abolished his rights to sue in the ordinary courts. HRH's capacity to sue, or to be sued, cannot now be recognized by the ordinary courts. As far as the ordinary courts under Pt IX of the Constitution are concerned, they continue as before to have no jurisdiction to hear any civil case against HRH, and in addition they also cease to have jurisdiction to hear all civil cases by HRH. The jurisdiction over these matters, even if the immunity is waived, has now been conferred exclusively on this Special Court.

That being the case, the advice of the Privy Council in *Sultan of Johor, supra*, that where a Ruler has submitted to the jurisdiction of the court, he is deemed to have waived his immunity, must now be read in the light of arts. 181 and 182 and the above judgment of Mohd Azmi FCJ to the effect that the voluntary submission to jurisdiction to an ordinary court under Part IX of the Constitution does not affect the position that in so far as a Ruler is concerned, whether he is a plaintiff or defendant in his personal capacity, the proper forum is exclusively the Special Court.

In *DYTM Tengku Idris Shah, supra*, the Federal Court in a judgment delivered by Dennis Ong JCA reaffirmed that having regard to arts. 181 and 182, a Ruler is liable to be sued and may also sue in his personal capacity, and such proceedings whether by or against a Ruler in his personal capacity must be brought in the Special Court.

While the above principles have now been settled by authoritative judgments, it is pertinent to point out that art. 181(1), *supra*, provides for the entrenchment of the Rulers' sovereignty, prerogatives, powers and jurisdictions.

In my judgment, art 181(1) would include the Rulers' prerogative in granting a power of attorney to any person of legal capacity in order to authorise the donee of the power of attorney to act as his lawful attorney to do all things in accordance with the law eg, in the instant case to commence legal proceedings for and on behalf of the principal. Had this action been commenced by the principal in this court in his personal capacity, there can be no doubt this court would have no jurisdiction at all and the suit ought to be struck out under O. 18 r. 19(1)(a), (b) or (d) as prayed for by D4.

However, the true position in the instant appeal is that the Ruler is not suing in his personal capacity as the plaintiff. It is the attorney who is suing as the plaintiff pursuant to the power of attorney. As a non-Ruler, the plaintiff is subject to the jurisdiction of the High Court as one of the ordinary courts. It appears to me that the true position in the instant appeal does not plainly and obviously come within the ambit and purview of O. 18 r. 19(1)(a), (b) or (d). It is a matter which is premature for decision now, but has to be resolved after a full trial.

In *Bandar Builder*, *supra*, the Supreme Court through the judgment of Mohamed Dzaiddin SCJ (later CJ Malaysia) has authoritatively explained that the principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) are well settled and added that:

1. it is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer on the face of it is "obviously unsustainable"; and

2. so long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that it was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out.

Conclusion

On the foregoing grounds, I am hold that the learned registrar's decision is correct which I hereby affirm. Hence D4's appeal is devoid of merits and is dismissed with costs.